FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 10 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, ~~1958~~ 1959

No. 202

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH K. HERTOGS,
580 Washington Street,
San Francisco, California,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
408 S. Spring Street,
Los Angeles, California,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

SUBJECT INDEX

PAGE

Opinions below 2

Grounds on which the jurisdiction of this court is invoked 2

Questions presented for review 2

Statutes involved 3

Statement of the case 3

Facts 3

Reasons for granting the writ and argument amplifying same 5

I.

The decision of the court below is in conflict with applicable decisions of this court 5

II.

The decision of the court below is in conflict with decisions of other courts of appeal on the same subject 10

III.

Assuming that the rule of the Ahrens case be not applicable to the situation in the instant case (which we do not concede), then the court below has decided an important question of federal law, viz., whether the jurisdiction of the District Courts to issue writs of habeas corpus ad testificandum extends beyond their territorial jurisdiction, which question has not been but should be settled by this court 13

Conclusion 14

Appendices:

Appendix "A." Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix "B." Judgment ..... App. p. 2

Appendix "C." Texts of pertinent statutes ..... App. p. 3

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aherns v. Clark, 335 U. S. 188, 92 L. Ed. 1889	5, 6, 7, 9, 11, 12, 13
Crowe v. United States, 169 F. 2d 1022	10
Edgerly v. Kennelly, 215 F. 2d 420	10, 11
Goldberg v. Hoffman, 225 F. 2d 463	10, 12
Hibdon v. Warden, etc., 245 F. 2d 816	10
Johnson v. Eisentrager, 339 U. S. 763, 94 L. Ed. 1255	5, 6, 7, 13
Johnson v. Matthews, 182 F. 2d 677, certiorari denied	10
McAffee v. Clemmer, 171 F. 2d 131	10
United States v. Hayman, 342 U. S. 205	7, 9
White v. United States, 190 F. 2d 365	10

RULES	
Rules of the Supreme Court of the United States, Rule 19-(1)(b)	10, 12, 13

STATUTES	
Act of June 25, 1948, Chap. 646, 62 Stat. 944	3
Act of June 24, 1948, Chap. 646, 62 Stat. 964	3
Act of June 25, 1948, Chap. 646, 62 Stat. 967	3
Act of May 24, 1949, Chap. 139, par. 90, 63 Stat. 102	3
Act of May 24, 1949, Chap. 139, par. 114, 63 Stat. 105	3
Act of May 24, 1949, Chap. 139, par. 1112, 63 Stat. 105	3
United States Code, Title 28, Sec. 452	6
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1651	7, 9
United States Code, Title 28, Sec. 1651(a)	3, 5, 8
United States Code, Title 28, Sec. 2101	2
United States Code, Title 28, Sec. 2241	2, 3, 6, 7, 9
United States Code, Title 28, Sec. 2255	3, 7, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1958~~ 1959

No. .....

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Frank DeSimone, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment dismissing petitioner's appeal from the order of the United States District Court for the Southern District of California denying petitioner's motion to quash the writ of habeas corpus *ad testificandum* issued by said District Court at the request of the United States Attorney for the Southern District of California, and directing that the petitioner, then in the custody of the Warden of the Federal Detention Headquarters in New York City, New York, be produced before a Federal Grand Jury in said Southern District of California for the purpose of petitioner's testifying as a witness before said Grand Jury.

Opinions Below.

The District Court delivered no written opinion upon the making of its order denying petitioner's motion to quash said writ.

A copy of the opinion of the Court of Appeals for the Ninth Circuit is appended hereto and marked Appendix "A".

The judgment of said Court of Appeals is appended hereto and marked Appendix "B".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is April 29, 1959.

2. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1254(1); 28 U. S. C. 2101; and, 28 U. S. C. 2241.

Questions Presented for Review.

Does a district court have jurisdiction to issue a writ of habeas corpus *ad testificandum* requiring the production of a prisoner, then confined beyond said court's territorial jurisdiction, to appear before a grand jury in said district for the purpose of said prisoner's testifying as a witness before said grand jury?

Do the provisions of the "all writs" statute give said district court jurisdiction to order said prisoner from outside of its territorial jurisdiction for the purpose of requiring him to appear and testify before a grand jury in said district?

Statutes Involved.

The statute under which said writ of habeas corpus *ad testificandum* was issued is 28 U. S. C. 2241, (June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Par. 112, 63 Stat. 105).

The statute relied upon by the Court of Appeals in its decision is 28 U. S. C. 1651(a). (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139. Par. 90, 63 Stat. 102.)

The statute interpreted by this Court in the *Hayman* case, *infra*, and which case is relied upon by the Court of Appeals in its decision, is 28 U. S. C. 2255, (June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Par. 114, 63 Stat. 105).

The texts of said statutes are set out hereinafter as Appendix "C".

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

The trial court had jurisdiction under 28 U. S. C. 2241.

Facts.

In February of 1959, petitioner, an attorney at law in the State of California, was in custody of the Attorney General of the United States, serving a term of six months' imprisonment pursuant to a commitment based upon a judgment of contempt rendered by the United States District Court for the Southern District of New York. The contempt arose out of the failure of the petitioner to appear at a specified time in response to a subpoena ordering him to appear before a Grand Jury in the Southern District of New York. An appeal has been

taken from said judgment and is now pending before the United States Court of Appeals for the Second Circuit. Meanwhile, petitioner is still in custody serving his term of imprisonment.

On February 25, 1959, an application was made to the United States District Court for the Southern District of California by the United States Attorney for said District, for a writ of habeas corpus *ad testificandum* directed to the Warden of the Federal Detention Headquarters, New York City, who was petitioner's then custodian, commanding said Warden to produce petitioner before a special Grand Jury which had theretofore been impaneled in said district, for the purpose of having said witness testify as a witness before said Grand Jury. (Vol. I, Document No. 1.) Said application was granted, the clerk of said Court issued said writ, and the hearing thereon was set for March 24, 1959. (Vol. I, Document No. 2.) Pursuant to said writ, petitioner was brought from New York to Los Angeles, California. On March 23, 1959, petitioner filed a motion to quash said writ upon the ground, among others, that the issuance of said writ was in excess of the District Court's jurisdiction. (Vol. I, Document No. 3.) Hearing on said motion was had on March 24, 1959, before United States District Judge Harry C. Westover, and on April 3, 1959, Judge Westover made and entered an order denying said motion. (Vol. I, Document No. 6.) Thereafter, and on April 9, 1959, petitioner filed notice of appeal to the United States Court of Appeals for the Ninth Circuit from the District Court's order denying said motion to quash said writ. (Vol. I, Document No. 7.) The Government then gave notice of motion to dismiss said appeal upon the ground that said appeal was frivolous and taken solely for the purpose of delay. (Vol. II, pp. 1-16,

inc.) Hearing on said motion was had before said Court of Appeals, and on April 29, 1959, said Court rendered its decision holding that the writ was authorized by the "all writs" statute, Title 28, Section 1651(a), and "for reasons similar to those stated in United States vs. Hayman, 342 U. S. 205, 220-221," and that the appeal was frivolous and should be dismissed. (Vol. II, p. 26; Appx. "A".) Judgment dismissing said appeal was entered on said April 29, 1959, (Vol. II, p. 27; Appx. "B"), mandate was issued on the same day, and on May 11, 1959, on motion of the Government, said mandate was spread upon the records of said District Court.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Decision of the Court Below Is in Conflict With Applicable Decisions of This Court.

The decision below is in conflict with this Court's decisions in *Ahrens v. Clark*, 335 U. S. 188, 92 L. Ed. 1898; and *Johnson v. Eisentrager*, 339 U. S. 763, 94 L. Ed. 1255, respectively.

In the instant case, the court below held that the writ of habeas corpus *ad testificandum*, issued by the District Court in California, authorized the producing of petitioner in California to testify before a Grand Jury there, though said petitioner was not within the territorial jurisdiction of said District Court at the time of the issuance of said writ.

The petitioner was serving a sentence imposed by the District Court for the Southern District of New York, and was confined in the Federal Detention Headquarters in New York City, in the custody of the Warden of that

institution, when the writ of habeas corpus *ad testificandum* was issued by the District Court for the Southern District of California directing the said Warden to produce the petitioner before a Grand Jury sitting in said Southern District of California; in other words, petitioner was clearly outside the territorial jurisdiction of said District Court when said writ was issued, and under the rule laid down in the *Ahrens* case that court was without jurisdiction to issue said writ.

In the *Ahrens* case, petitions for writs of habeas corpus were filed in the District Court for the District of Columbia. The prisoners were confined outside of that district and at Ellis Island in New York. The Court there held that the term "within their respective jurisdictions," as that phrase is used in 28 U. S. C. 452 (now 28 U. S. C. 2241) with reference to the power of the courts to issue writ of habeas corpus, limits the district courts' powers in that respect to the territorial jurisdictions of those courts, and that only where specific exceptions have been created by Congress is it otherwise (pp. 189-191). After tracing the history of the statute, this Court held that the jurisdiction of the District Court to issue a writ of habeas corpus is confined to cases where the one detained is within the territorial jurisdiction of the Federal District Court issuing the writ, and that that court does not have jurisdiction to issue such writ where the person detained is outside of the territorial jurisdiction of said court (pp. 191-193).

In the case of *Johnson v. Eisentrager, supra*, this court said:

> "We have consistently adhered to and recognized the general rule laid down in Ahrens v. Clark" (pp. 778-779).

The *Ahrens* case has never been overruled; on the contrary, it has been followed and approved by this Court in the *Johnson* case, *supra,* and in many decisions of the Court of Appeals for the various Circuits, and in some of which cases certiorari was denied by this Court. These cases are listed and referred to hereinafter.

The court below, contrary to this Court's ruling in the *Ahrens* case, held that the District Court in California had the power to order that petitioner be brought from New York, outside of said Court's territorial jurisdiction, and based its holding on the "all writs" statute (Title 28, U. S. C. 1651), "and for reasons similar to those stated in United States v. Hayman, 342 U. S. 205, 220-221."

In the *Hayman* case, it will be noted that the proceedings had were under Section 2255 of Title 28, U. S. C., and Section 2241 (the habeas corpus section) was not involved therein. In that case, the prisoner was confined in the Federal penitentiary in the State of Washington. He filed, in the District Court for the Southern District of California, a motion under said Section 2255 to vacate the sentence theretofore imposed upon him by that Court. He also requested an order to secure his presence at said hearing. The hearing was had without the prisoner's presence, and his motion to vacate was denied.

In its opinion in the *Hayman* case, this Court traces and discusses the reasons for the adoption of said Section 2255, chief among which was the increase in the number of applications for habeas corpus filed for the purpose of challenging convictions, and which applications, of necessity, were required to be filed in the district in which the prisoner was confined, though the facts had taken

place in the district in which the prisoner had been sentenced. In this connection, this Court said:

> "This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum" (pp. 218-219).

This Court there held that Section 2255 required that the trial court "grant" a prompt hearing thereon," that in requiring a "hearing" the section "has obvious reference to the tradition of judicial proceedings" and that the District Court did not proceed in conformity with Section 2255 when it decided controverted issues of fact without notice to the prisoner and without his presence (pp. 219-221). This Court then held that the District Court is not impotent to hold the hearing required under Section 2255 and to require the prisoner's presence at said hearing so long as it may invoke the statutory authority of all Federal courts to issue "all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," (28 U. S. C. 1651a), and held that "An order to secure the prisoner's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or approriate' to the exercise of its jurisdiction under Section 2255."

It will be noted that the jurisdiction was given the sentencing court under Section 2255 to hold such hearing, and

this Court held that the use of an order under the "all writs" statute was "necessary and appropriate" to the exercise of that jurisdiction which the Court had *under the section itself*. As was said by this Court:

> "Issuance of an order to produce the prisoner is auxiliary to the *jurisdiction of the trial court over respondent granted in Section 2255 itself* and invoked by respondent's filing of a motion under that Section" (pp. 219-221). (Emphasis ours.)

However, under Section 2241, the jurisdiction of the District Court is limited to its territorial jurisdiction, and the "all writs" statute (Section 1651) cannot enlarge the jurisdiction of that Court; and, as has been said, while Section 1651 augments the power of a court in cases of *existing jurisdiction* (as in the case of Section 2255) it in no wise extends or expands the court's territorial jurisdiction.

As clearly demonstrating the inapplicability of the rule laid down in the *Hayman* case to the situation in the instant case, nd pointing out its adherence to the principle enunciated in the *Ahrens* case relating to the territorial jurisdiction of district courts in the issuance of writs of habeas corpus, this Court, in the *Hayman* case, said:

> "The Court below also held that the sentencing court could not hold the required hearing because it was without power to order the presence of a prisoner confined in another district. This power was thought to follow from our decision in Ahrens v. Clark, 335 U. S. 188, 92 L. Ed. 1898, where we held that the phrase 'within their respective jurisdictions' in the habeas corpus statute (28 U. S. C. 452, now 2241) required the presence of the prisoner within the territorial jurisdiction of the District Court as

a prerequisite to his filing of an application for habeas corpus. THIS IS NOT A HABEAS CORPUS PROCEEDING. THE SENTENCING COURT IN THE SOUTHERN DISTRICT OF CALIFORNIA WOULD NOT BE ISSUING AN ORIGINAL WRIT OF HABEAS CORPUS TO SECURE RESPONDENT'S PRESENCE IN ANOTHER DISTRICT. *Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that section"* (pp. 219-221). (Emphasis ours.)

Under this Court's Rule 19(1)(b) (4th phrase), because of the conflict between the instant case and the cases discussed under this Point I, the granting of certiorari is justified.

II.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeal on the Same Subject.

The decision below conflicts with the decisions of the United States Courts of Appeal in the following cases:

Crowe v. United States, 169 F. 2d 1022 (C. A. 4);

McAffee v. Clemmer, 171 F. 2d 131 (C. A. Dist. of Col.); certiorari denied;

White v. United States, 190 F. 2d 365 (C. A. 6);

Hibdon v. Warden, etc., 245 F. 2d 816 (C. A. 6);

Edgerly v. Kennelly, 215 F. 2d 420 (C. A. 7);

Johnson v. Matthews, 182 F. 2d 677 (C. A. Dist. of Col.); certiorari denied;

Goldberg v. Hoffman, 225 F. 2d 463 (C. A. 7).

All of the foregoing cases follow the rule laid down in the *Ahrens* case with reference to the territorial jurisdiction of the district courts in habeas corpus cases.

In the *Edgerly* case, *supra*, the Court of Appeals for the Seventh Circuit held that the District Court in Illinois was without jurisdiction to issue a writ of habeas corpus *ad testificandum* directed to the Warden of the prison at Alcatraz to produce a prisoner confined in that institution, to give testimony in court in Chicago, Illinois.

In discussing the limitation upon the jurisdiction of the courts in habeas corpus cases, and the contention that the "all writs" statute enlarged that jurisdiction, the Court of Appeals said:

> "Plaintiff concedes that the jurisdiction of the court, if it exists, must be found in the 'all writs' statute, 28 U. S. C. A. 1651, which authorizes the courts 'to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' It is pointed out that the court had jurisdiction of the action and it was in aid of its jurisdiction that the plaintiff be brought to Chicago to testify in his own behalf. *This contention, if accepted, would mean that this provision enlarged the territorial jurisdiction of the court. We think that such is not its purpose. While the section augments the power of a court in cases of existing jurisdiction, it in no wise extends or expands its territorial jurisdiction.*
>
> "As stated in In re Previn, 1 Cir. 204 F. 2d 417, 418, 'The sole purpose of 1651 and of its statutory predecessors was to assure to the various federal courts the power to issue appropriate writs and or-

ders of an auxiliary nature *in aid of their respective jurisdictions as conferred by other provisions of law*" (p. 427). (Emphasis ours.)

The Court of Appeals then cites cases, including the *Ahrens* case, holding that the District Courts cannot issue process beyond their territorial limits, and that a specific exception by Congress is necessary to the extension of a district court's jurisdiction.

And in the *Goldberg* case, *supra*, in dealing with the same subjects, the Court of Appeals in its decision, said:

"The historic limitation of the jurisdiction of the various federal courts to the circuit or district in which they sit, is too well established to require restatement. Georgia v. Pennsylvania R. R. Co. 324 U. S. 439, 467, 65 S. Ct. 716, 89 L. Ed. 1051; Edgerly v. Kennelly, 7 Cir. 215 F. 2d 420, Reconstruction Finance Co. v. Maley, 7 Cir., 125 F. 2d 131, 137. *We have recently rejected as untenable the theory that the All Writs Act, 28 U. S. C. A. Par. 1651, may enlarge the territorial jurisdiction of the federal courts.* Edgerly v. Kennelly, supra, 215 F. 2d at pages 421-422. See also Ahrens v. Clark, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898" (p. 467). (Emphasis ours.)

Under this Court's Rule 19(1)(b) (1st phrase) this is a proper case for the granting of certiorari so that the conflict in these decisions may be resolved by this Court.

III.

Assuming That the Rule of the Ahrens Case Be Not Applicable to the Situation in the Instant Case (Which We Do Not Concede), Then the Court Below Has Decided an Important Question of Federal Law, Viz., Whether the Jurisdiction of the District Courts to Issue Writs of Habeas Corpus Ad Testificandum Extends Beyond Their Territorial Jurisdiction, Which Question Has Not Been but Should Be Settled by This Court.

We have attempted to show that the decision of the Court below is in conflict with the decisions of this Court in the *Ahrens* and *Johnson* cases, respectively, and also with the decisions in the numerous cases decided by the various United States Courts of Appeal. If this Court should hold that no such conflict, as suggested, appears, then the Court below has decided an important question of Federal Law, which has not been, but should be, settled by this Court. That question is: Does the jurisdiction of the district courts to issue writs of habeas corpus *ad testificandum* extend beyond the territorial jurisdiction of those courts?

Under the circumstances, this is a proper case under this Court's Rule 19(1)(b) (3rd phrase) to grant certiorari.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted, and upon review by this Court of the judgment of the Court of Appeals for the Southern District of California, said judgment should be reversed.

JOSEPH K. HERTOGS,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
Of Counsel.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

Frank DeSimone, Appellant, vs. United States of America, Appellee. Misc. No. 843.

Upon Motion to Dismiss Appeal.

Before: POPE, STEPHENS and HAMLIN, Circuit Judges

Per Curiam.

The writ under which it was commanded that appellant be produced to testify before the Grand Jury at Los Angeles was authorized by the "all writs statute," Title 28, Sec. 1651(a) and for reasons similar to those stated in United States v. Hayman, 342 U. S. 205, 220-221. And since bringing appellant to testify before a grand jury is a bringing of him "into court to testify" within the meaning of Title 28 Sec. 2241(c)(5) we hold the appeal frivolous and it is dismissed.

/s/ WALTER L. POPE
/s/ ALBERT LEE STEPHENS
/s/ OLIVER D. HAMLIN
United States Circuit Judges

(ENDORSED) Filed April 29, 1959
PAUL P. O'BRIEN, Clerk.

APPENDIX "B."

United States Court of Appeals for the Ninth Circuit.

Frank DeSimone, Appellant, vs. United States of America, Appellee. Misc. No. 843.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of appellee for dismissal of the appeal herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and entered: April 29, 1959

PAUL P. O'BRIEN, Clerk.

APPENDIX "C."

28 U. S. C. 1651. Writs:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Par. 90, 63 Stat. 102.

* * * * * * * *

28 U. S. C. 2241. Power to Grant Writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an

order, process, judgment or decree of a court or judge of the United States: or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or,

(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or,

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Par. 112, 63 Stat. 105.

* * * * * * * *

28 U. S. C. 2255. Federal custody; remedies on motion attacking sentence:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,

the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render its judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Par. 114, 63 Stat. 105.

FILE COPY

Supreme Court, U.S.
FILED
APR 10 1959
Clerk

No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUPPORTING MOOTNESS

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

Cases:	Page
Ahrens v. *Clark*, 335 U.S. 188	3
Baez, Ex parte, 177 U.S. 378	2
Brownlow v. *Schwartz*, 261 U.S. 216	2
Cuckovich v. *United States*, 170 F. 2d 89, certiorari denied 336 U.S. 905	3
Downey v. *United States*, 91 F. 2d 223	3
Jones v. *Montague*, 194 U.S. 147	2
Mills v. *Green*, 159 U.S. 651	2
Price v. *Johnston*, 334 U.S. 266	3
St. Pierre v. *United States*, 319 U.S. 41	2
Thaw, In re, 166 Fed. 71	3
United States v. *Hayman*, 342 U.S. 205	3
United States v. *Munsingwear*, 340 U.S. 36	2
Miscellaneous:	
Black's Law Dictionary 4th Ed., 837	3
3 Blackstone's *Commentaries*, 189	3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 202

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

On February 25, 1959, the United States District Court for the Southern District of California issued a writ of habeas corpus ad testificandum directed to the Warden of the Federal Detention Headquarters, New York, New York, and the United States Marshal there, commanding that the petitioner, a prisoner at the Federal Detention Headquarters, be produced before a special grand jury in the Southern District of California on March 24, 1959, to testify in a matter under investigation (Vol. 1, Doc. 1 and 2).

On March 23, 1959, while the petitioner was in California, his attorney filed a motion to quash the writ on the ground, *inter alia*, that it was issued in excess of the court's jurisdiction (Vol. I, Doc. 3). The motion was denied, and the petitioner was ordered to appear before the grand jury on April 9, 1959 (Vol. I, Doc. 6). An appeal was noted, and after hearing argument on both sides, the District Court ordered a stay of its prior order directing the petitioner's attendance before the grand jury (Vol. I, Doc. 7 and 9). The Court of Appeals, on motion of the government, dismissed the appeal as frivolous (Vol. II, 26, 27).

The writ of habeas corpus ad testificandum was, however, subsequently discharged, and the petitioner was returned to the Federal Detention Headquarters in New York. He was released on July 10, 1959, following service of his term of imprisonment there (see No. 201, this Term). In view of that fact there is no longer any controversy as to which an order of the Court can be directed in this proceeding. Accordingly, the judgments below should be vacated and the cause remanded with directions to dismiss. See *United States* v. *Munsingwear*, 340 U.S. 36, 39-40; *Mills* v. *Green*, 159 U.S. 651, 653; *Jones* v. *Montague*, 194 U.S. 147, 152-153; *Ex Parte Baez*, 177 U.S. 378, 389-390; *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218; *St. Pierre* v. *United States*, 319 U.S. 41.

In any event, the District Court for the Southern District of California had authority to issue a writ of habeas corpus ad testificandum, directing a custodian outside the territorial jurisdiction of the court to produce the prisoner before the court for testimonial

purposes. *United States* v. *Hayman*, 342 U.S. 205, 221; *Price* v. *Johnston*, 334 U.S. 266, 281-283. Petitioner's reliance on *Ahrens* v. *Clark*, 335 U.S. 188 (where this Court held that a district court lacked jurisdiction to issue a writ of habeas corpus ad subjiciendum outside its territorial jurisdiction) is misplaced. There is a well recognized distinction between a writ of habeas corpus ad testificandum and the writ of habeas corpus ad subjiciendum. *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A.D.C.); *In re Thaw*, 166 Fed. 71, 74 (C.A. 3); *Cuckovich* v. *United States*, 170 F. 2d 89, 90 (C.A. 6), certiorari denied, 336 U.S. 905; Black's Law Dictionary, 4th Ed., 837-838; 3 Blackstone's *Commentaries*, 129-130. See *United States* v. *Hayman*, 342 U.S. 205, fn. 35 at 221.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

AUGUST 1959

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 516285 . 139

FILE COPY

FILED
SEP 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petitioner's Reply to Memorandum for the United States Suggesting Mootness.

JOSEPH K. HERTOGS,
580 Washington Street,
San Francisco, California,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
408 South Spring Street,
Los Angeles 13, California,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

SUBJECT INDEX

PAGE

Petitioner's Reply to Memorandum for the United States Suggesting Mootness 1

Appendices:

Appendix "A." Minute Order, Dated May 11, 1959..... App. p. 1

Appendix "B." Order to Show Cause in re Contempt..... App. p. 3

Appendix "C." Minute Order, Dated May 22, 1959..... App. p. 12

Appendix "D." Minute Order, Dated May 29, 1959..... App. p. 14

Appendix "E." Letter Dated July 27, 1959, Concerning Grand Jury Appearance..... App. p. 17

TABLE OF AUTHORITIES CITED

CASE PAGE

Edgerly v. Kennelly, 215 F. 2d 420..... 5

STATUTE

United States Code, Title 28, Sec. 2241..... 4, 5

IN THE

Supreme Court of the United States

October Term, 1959

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petitioner's Reply to Memorandum for the United States Suggesting Mootness.

I.

The Government contends that the question in issue in this proceeding is moot, because, as they say, the writ of habeas corpus *ad testificandum* under which petitioner was brought to Los Angeles to testify before a special grand jury in the Southern District of California was discharged and petitioner was returned to the Federal Detention Headquarters in New York, whence petitioner had been brought pursuant to said writ.

We have two answers to this contention:

A: The writ was not discharged; and,

B: There are now two matters pending before the District Court for the Southern District of California, both arising out of petitioner's presence in that Court's territorial jurisdiction pursuant to the command of the said writ:

1. An order of said District Court requiring petitioner to appear and be sworn before said special grand jury. (Appendices "A" and "D".)
2. A hearing on an order to show cause why petitioner should not be punished for contempt for refusing to appear and to be sworn before said special grand jury pursuant to the command of said writ and to the order of said District Court. (Appendices "B," "C" and "D.")

On May 11, 1959 the mandate from the Court of Appeals for the Ninth Circuit was filed in said District Court and petitioner was ordered to appear before said special grand jury on May 12, 1959. (Appendix "A.") On May 19, 1959, said District Court, upon application of the United States Attorney, issued an order to show cause why petitioner should not be adjudged in contempt for refusing to be sworn before said special grand jury on May 12, 1959, as ordered by said court. (Appendix "B.") Hearing on said matter was set for May 22, 1959. (Appendix "B.") On that date, May 22nd, the court continued the matter to May 29, 1959. (Appendix "C.") On May 29th, the hearing was had, and the Court ordered the petitioner to appear and be sworn before said special grand jury on July 30, 1959 at 9:30 A.M., and ordered the contempt matter held in abeyance until petitioner had so appeared and been sworn before said special grand jury. (Appendix "D.") Just prior to said May 29th, petitioner was arraigned in the District Court for the Southern District of California, upon an indictment returned in the United States District Court for the Southern District of New York, and a removal hearing on said

indictment was set for June 2, 1959 before the United States Commissioner for the District Court in Los Angeles, California. On the evening of June 1, 1959, without notice to the petitioner or to his attorneys, and without any order of court so far as can be ascertained from the record, petitioner was taken from the county jail in Los Angeles, California and returned by plane to New York where he was imprisoned in the Federal Detention Headquarters there; and this despite the fact that the removal hearing on the New York indictment was set for the next morning, June 2, 1959. The petitioner having been taken back to New York, as aforesaid, no removal hearing was had.

The writ of habeas corpus *ad testificandum* was never discharged, by order of the court, or otherwise. The writ had ordered the petitioner produced to testify before the special grand jury sitting in Los Angeles, and to be returned to New York upon the completion of his testimony. However, the matter for which he had been produced in California, viz., to testify before the special grand jury, had not been completed; to the contrary, at the time petitioner was taken back to New York, as above set forth, there was pending an order of the court that petitioner appear before said special grand jury on July 30, 1959. (Appendix "D.")

As we have pointed out above, the hearing on the order to show cause why petitioner should not be punished for contempt for refusing to be sworn before the special grand jury was had on May 29th, and at that time petitioner was ordered to appear and be sworn before said special grand jury on July 30, 1959, and the contempt matter was ordered held in abeyance until petitioner had so appeared and been sworn. (Appendix "D.") Just prior

to said July 30th, and on July 27, 1959, the Special Assistant to the Attorney General in charge of this matter addressed and caused to be sent to petitioner's counsel a letter concerning petitioner's grand jury appearance, in which he advised that it would not be necessary for the petitioner to appear before said special grand jury on July 30, 1959 as theretofore ordered by District Judge Harry C. Westover, and that "when it became feasible, a new time will be set for DeSimone's appearance in accordance with the order referred to above and you will be so advised. (Appendix "E") We find, then, that at the present time there is still pending the court's order that petitioner appear and be sworn before said special grand jury, and also, there is still pending the contempt proceeding which was ordered held in abeyance pending petitioner's appearance before and his being sworn before said grand jury, both of which matters arise out of the writ of habeas corpus *ad testificandum*, which petitioner claims the said District Court was without power to issue and which claim is the basis of petitioner's petition herein.

II.

The Government also contends that the District Court for the Southern District of California had power to issue the writ in question, and endeavors to make a distinction between the writ of habeas corpus *ad testificandum* and the writ of habeas corpus *ad subjiciendum*. We have no quarrel with the distinction between the various writs of habeas corpus, as pointed out in the cases cited by the Government. Concededly, each of the writs is for a different purpose or object. However, the power to grant the writ is governed by Section 2241 of 28 U. S. C.; and, as pointed out in our petition, this Court has held that the term "within their respective jurisdictions," as that

phrase is used in said section 2241, limits the district courts' powers to issue the writ to the territorial jurisdictions of those courts, unless specific exceptions have been created by Congress. Congress has created no exceptions to the powers of said district courts in this respect.

We note that the Government has neither mentioned nor discussed the cases cited by petitioner in his petition (other than *Ahrens v. Clark*), and particularly the case of *Edgerly v. Kennelly*, 215 F. 2d 420 (C. A. 7), which is directly in point here and in which it was held that the District Court in Illinois was without jurisdiction to issue a writ of habeas corpus *ad testificandum* directed to the Warden of the prison at Alcatraz to produce a prisoner confined in that institution, to give testimony in court in Chicago, Illinois.

Conclusion.

We submit that the writ of habeas corpus *ad testificandum* was not discharged; that the question in issue raised by the petition is not moot; and, that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH K. HERTOGS,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
Of Counsel.

APPENDIX "A."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
John Doe
(witness Frank DeSimone)

No. Misc. 297 Civil
MINUTES OF THE COURT
Date: May 11, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge; Deputy Clerk E. J. Fisher; Reporter: S. J. Trainor
Counsel for Plaintiff Lloyd F. Dunn, Assistant U. S. Attorney

Counsel for Defendant no appearance

PROCEEDINGS: For (1) filing and spreading Mandate of U. S. Court of Appeals, dismissing the appeal; (2) hearing motion of plaintiff, filed April 30, 1959, for an order setting aside its order staying execution as to Frank DeSimone.

Attorney Dunn moves to have said mandate spread.

Court orders that said mandate be filed and spread upon the records of this court.

Court orders that motion of plaintiff, filed April 30, 1959, for an order setting aside its order staying execution as to Frank DeSimone, is granted.

All witnesses are ordered to appear before the Grand Jury May 12, 1959, 9:30 AM.

(SEAL)

I hereby certify on Sep 2 1958 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By /s/ E. J. FISHER,
E. J. FISHER, *Deputy Clerk.*

HW-5/11/59.

APPENDIX "B."

LAUGHLIN E. WATERS
United States Attorney
LLOYD F. DUNN
Special Assistant to the Attorney General
762 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411, Ext. 303
Attorneys for United States of America.

United States District Court, for the Southern District of California, Central Division.

United States of America, Plaintiff v. Frank DeSimone, Defendant.

Filed May 19, 1959, By M. E. Thompson, Deputy Clerk.

Misc. No. 297.

ORDER TO SHOW CAUSE IN RE CONTEMPT.

Upon the annexed affidavit of Lloyd F. Dunn, Special Assistant to the Attorney General of the United States, duly verified the 14th day of May, 1959, it is hereby

ORDERED that FRANK DESIMONE show cause before this court on the 22nd day of May, 1959, at 10:00 o'clock in the forenoon of that day, in Courtroom No. 5, United States Courthouse and Post Office Building, 312 North Spring Street, Los Angeles, California, or as soon thereafter as this matter may be heard, why he should not be adjudged and held in contempt of court and punished for such contempt of this court by reason of the fact that he wilfully and contemptuously disobeyed the order of the aforesaid court before the Honorable Harry C. Westover, United States District Judge, commanding respondent to

appear and testify before a duly constituted federal grand jury at 9:30 A.M. on May 12, 1959.

Dated: 5/19/59

/s/ .....
United States District Judge

Prepared by:

Lloyd F. Dunn
Special Assistant to the Attorney General

LFD:lmf

(SEAL)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

LAUGHLIN E. WATERS
United States Attorney
LLOYD F. DUNN
Special Assistant to the Attorney General
762 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411, Ext. 303
Attorneys for United States of America.

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff v. Frank DeSimone, Defendant.

Misc. No.

AFFIDAVIT.

LLOYD F. DUNN, Special Assistant to the Attorney General of the United States, being duly sworn, deposes and says:

1) Deponent is a duly appointed Special Assistant to the Attorney General of the United States charged with the duties, responsibilities and authority to investigate and prosecute possible violations of Federal criminal law.

2) On January 9, 1959, upon the request of the United States Attorney for the Southern District of California, a special grand jury was duly empaneled.

3) This special grand jury initiated an investigation into organized crime and racketeering in this District.

4) In the course of this investigation, information came to the attention of the special grand jury indicating the necessity and desirability of having Frank DeSimone, an attorney duly authorized to practice law in the State

of California and in this Court, and whose offices have been located in the Southern District of California, appear and testify.

(SEAL)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By /s/ L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

LFD:CAL:
Lmf

5) Frank DeSimone was at that time incarcerated at the Federal Detention Center in New York City, New York, in the custody of the Attorney General of the United States.

6) The United States District Court, Southern District of California, upon application of the United States of America issued a writ of habeas corpus ad testificandum commanding the warden of said prison to produce the person of Frank DeSimone before the special grand jury in the Southern District of California on March 24, 1959.

7) Frank DeSimone was transported and did arrive in the City of Los Angeles, California, on March 12, 1959, and on direction of the special grand jury was brought before that body on March 17, 1959.

8) When he appeared before the special grand jury on March 17, 1959, Frank DeSimone refused to take the

oath tendered by the grand jury foreman alleging that he had not had sufficient opportunity to consult with his attorneys.

9) At that time his request for an opportunity to consult with his attorneys was granted and the United States Marshal was instructed to permit Frank DeSimone to consult his attorneys before he was returned to the Los Angeles County Jail, and also, if necessary, afford him the opportunity to contact his attorneys from the Los Angeles County Jail where he was maintained in custody.

10) Upon direction of the foreman of the grand jury, the witness was returned the following morning, March 18, 1959, at 9:30 A.M. at which time he again refused to take the oath on the ground that he still had not had sufficient time to consult with his attorneys and further that the writ of habeas corpus ad testificandum was subject to legal objections which he had not had the opportunity to interpose. His request for additional time was again granted and he was directed by the foreman of the special grand jury to return on March 24, 1959, at 9:30 A.M.

11) On March 23, 1959, a motion was filed with this Honorable Court by Frank DeSimone through his attorneys G. Vernon Brumbaugh and William B. Beirne to quash the writ of habeas corpus ad testificandum which motion was argued before the Honorable Harry C. Westover, United States District Judge, Southern District of California, on March 24, 1959. This motion was denied on April 3, 1959, and the witness was ordered to appear before the special grand jury on April 9, 1959; however, a motion to stay the execution of this order pending appeal was granted.

12) A notice of appeal was filed by the witness through his attorneys on April 8, 1959, and a motion to dismiss this appeal was filed by the United States of America on April 15, 1959.

13) Arguments on the motion to dismiss the appeal were heard by the Ninth Circuit Court of Appeals on April 27, 1959, and the appeal was dismissed as frivolous by the Circuit Court on April 29, 1959.

14) Motions to spread the mandate of the Circuit Court of Appeals and to set aside the staying order of the District Court, for the Southern District of California were made by the United States of America on May 11, 1959, due notice having been given, and were then granted by the Honorable Harry C. Westover, who further ordered Frank DeSimone to appear as a witness before the special grand jury at 9:30 A.M. on May 12, 1959.

15) On May 11, 1959, at the time of the motions referred to in the next preceding paragraph, the witness Frank DeSimone was not represented by counsel in the courtroom; however, upon leaving the courtroom the witness's attorney, William B. Beirne, was observed by the deponent, by Charles A. Lynberg, Special Attorney, United States Department of Justice, and by newspaper reporters Charles Neisswender and William J. Burns. At that time attorney William B. Beirne expressed surprise that the proceedings had been completed and further stated that he had been outside the courtroom for a considerable period of time.

16) Attorney for the witness Frank DeSimone, William B. Beirne, appeared in the offices of deponent on May 12, 1959, at 9:10 A.M. and appealed to the courtesies of deponent as a fellow attorney requesting that the

witness again be excused from appearing before the grand jury on that date, stating his intention to appeal from the decision of the Ninth Circuit Court of Appeals to the United States Supreme Court. Deponent denied this request on the ground that notice of the motion to set aside the staying order was served upon the witness through service upon his attorneys by certified mail on April 30, 1959, thus affording him sufficient time to take any further action he deemed appropriate.

17) In accordance with the order of the United States District Court made on May 11, 1959, the United States Marshal brought the witness Frank DeSimone to the grand jury room at 9:30 A.M., May 12, 1959, at which time the witness again refused to take the oath tendered by the foreman of the special grand jury on the ground that the District Court was without jurisdiction to grant the petition for writ of habeas corpus requiring him to testify before the special grand jury and further that the special grand jury had no jurisdiction insofar as he, Frank DeSimone, was concerned.

18) The foreman of the grand jury then and there directed the witness Frank DeSimone to take the oath whereupon the witness again refused, standing upon the objections that he had previously made.

WHEREFORE, your deponent prays that this Honorable Court enter an order requiring the said Frank DeSimone, the respondent herein, to appear in this Court in person and show cause why he should not be held and adjudged in contempt of this Court in view of his said contemptuous and obstructive conduct and that he be punished by fine or imprisonment at the discretion of the Court as for criminal contempt and for such other and further

order of this Court as may seem proper and just in the premises.

/s/ LLOYD F. DUNN
LLOYD F. DUNN
Special Assistant to the
Attorney General

SUBSCRIBED and SWORN to before me this *14th* day of May, 1959.

JOHN A. CHILDRESS, *Clerk*
U. S. District Court
Southern District of California
By /s/ N. E. BROCKMAN, *Deputy*

POINTS AND AUTHORITIES

All persons within the jurisdiction of the United States have a public duty to appear and give testimony before grand juries when summoned.

Blair v. U. S., 250 U.S. 273, 281

CERTIFICATE OF SERVICE BY MAIL

I, Lauretta M. Filter, state:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 762 Post Office and Court House, Los Angeles, California; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That on May ~~14~~ 19 lmf, 1959, I deposited in the United States mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ORDER TO SHOW CAUSE IN RE CONTEMPT and AFFIDAVIT addressed to William B. Beirne and G. Vernon Brumbaugh, Attorneys at Law, 139 No. Broadway, Suite 711, Los Angeles 12, California, *their* last known address, at which place there is a delivery service by United States mails from said post office.

This certificate is executed on May ~~14~~ 19 lmf, 1959 at Los (date)
Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ LAURETTA M. FILTER
LAURETTA M. FILTER

(SEAL)

APPENDIX "C."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
Frank DeSimone

No. Misc. 297 Civil
MINUTES OF THE COURT
Date: May 22, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge; Deputy Clerk: E. J. Fisher; Reporter: Arthur J. Hughes

Counsel for Plaintiff: Lloyd F. Dunn, Assistant U. S. Attorney, and Chas. Lynberg and Meyer Newman, Special Attorneys, Dep't of Justice,

Counsel for Defendant: G. Vernon Brumbaugh and Wm. B. Beirne.

PROCEEDINGS: For hearing on order to show cause in re contempt for failure to appear and testify before the Federal Grand Jury.

Attorneys Beirne and Brumbaugh request a continuance of the matter, stating that they do not have sufficient time to prepare and that the order to show cause re contempt was not served upon them in time, pursuant to Local Rule 3, Paragraph J.

Court denies said motion and mentions that the Court of Appeals states that the appeal of the respondent was frivolous, and that the District Court may make exceptions to Rule 3(j).

Attorney Beitne states that counsel is preparing a Petition for Writ of Certiorari to the Supreme Court as to whether or not the District Court has jurisdiction and that if the Supreme Court so decides, there will be no jurisdiction here.

Attorneys for Gov't state they have no objection to a reasonable continuance of this matter to allow counsel for respondent sufficient time to prepare points and authorities, and further state that the Gov't will introduce transcript of various proceedings re respondent before the Grand Jury by reference.

Later, Court orders the matter continued to Friday, May 29, 1959, 11 AM, and states that if Friday is a holiday (Decoration Day, May 30, 1959, Saturday) then the matter will go over to Monday, June 1, 1959, 3 PM.

Court orders that all points and authorities be filed by May 28, 1959.

Filed Memo. of U. S. Attorney re criminal contempt.

(Seal)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By L. A. BROSNAN, *Deputy.*

L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By E. J. FISHER
E. J. FISHER, *Deputy Clerk.*

HW-5/22/59.

APPENDIX "D."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

U. S. A.
vs.
Frank DeSimone

No. 297 Misc. Civil
MINUTES OF THE COURT
Date: May 29, 1959,
At: Los Angeles, Calif.

PRESENT: Hon. HARRY C. WESTOVER District Judge;
Deputy Clerk; E. J. Fisher; Reporter: S. J. Trainor
Counsel for Plaintiff: Lloyd F. Dunn, Special Assistant to Att'y General;
Counsel for Plaintiff: Chas. A. Lynberg, Meyer, Newman, Pat Coleman, Special Attorneys, Dep't of Justice;
Counsel for Defendant: G. Vernon Brumbaugh and Wm. Beirne.

PROCEEDINGS: For hearing on order to show cause in re contempt for failure to testify before the Federal Grand Jury.

Attorney Dunn makes a statement in opening re marking Gov't exhibits.

Court makes a statement that defendant's memo. re certain questions be taken up first.

Attorney Beirne makes a statement re attention of the Court to his memo.

Attorney Beirne states that defendant's counsel will proceed with a Writ of Certiorari to the Supreme Court

and moves the Court that this matter be continued until the decision of the Supreme Court as to whether or not the Writ will be granted. Court denies said motion.

Gov't Ex. 1 to 5 incl. are marked for ident.

Filed defendant's answer with affidavits of Attorneys Beirne and Brumbaugh, and Defendant DeSimone.

Gov't Ex. 1, 2, and 3 are admitted in evidence over objections of the defendant.

Gov't Ex. 4 and 5 are admitted in evidence. No objections. Exhibit 5 by reference only.

At 11:30 AM Gov't. rests.

Attorney Beirne moves to dismiss order to show cause as it is outside the jurisdiction of this Court. Court denies said motion.

Defendant offers answer and three affidavits into evidence, and same are admitted in evidence as Deft's Ex. A.

Attorney Brumbaugh is sworn and testifies for defendant.

At 11:55 AM defendant rests.

Court makes a statement re defendant coming forward and stating whether or not he will take the oath and testify. Defendant still refuses.

Court advises the defendant that if he fails to appear and be sworn to testify before the Grand Jury he will have to be held in contempt.

At 12:15 PM Court orders cause continued to 2 PM. today. for further hearing. At 2 PM court reconvenes. All present as before.

Defendant now answers yes and that he will appear before the Grand Jury and be sworn to testify.

COURT ORDERS defendant to appear before the Grand Jury July 30, 1959, 9:30 AM, and that cause be held in abeyance and come before Judge Westover at that time.

(Seal)

I hereby certify on Sep 2 1959 that the foregoing is a full and true copy of the original on file with this Court.

CLERK U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By L. A. BROSNAN, *Deputy.*
L. A. BROSNAN

JOHN A. CHILDRESS, *Clerk,*
By E. J. FISHER
E. J. FISHER, *Deputy Clerk.*

HW-5/29/59.

APPENDIX "E."

UNITED STATES DEPARTMENT OF JUSTICE
762 Federal Building
Los Angeles 12, California
July 27, 1959

G. Vernon Brumbaugh, Esq.
Attorney at Law
139 North Broadway, Suite 711
Los Angeles 12, California

Re: Frank DeSimone
Grand Jury Appearance

Dear Mr. Brumbaugh:

This is to advise you that it will be unnecessary for Frank DeSimone to appear before the Federal Special Grand Jury on July 30, 1959, as ordered by District Judge Harry C. Westover. This excuse is being given in view of DeSimone's commitments to the Federal District Court for the Southern District of New York in connection with *United States v. Bonanno, et al.*, and further in view of the fact that the grand jury will be in vacation for the remainder of the summer.

When it becomes feasible, a new time will be set for DeSimone's appearance in accordance with the order referred to above and you will be so advised.

Sincerely,

LLOYD F. DUNN
Special Assistant to the
Attorney General
Charles A. Lynberg
By /s/ CHARLES A. LYNBERG
Special Attorney

FILE COPY

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 202

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES REGARDING MOOTNESS

The issue in this proceeding is the power of the United States District Court for the Southern District of California to issue a writ of habeas corpus ad testificandum directed to the Warden of the Federal Detention Headquarters in New York to produce petitioner in California. Although the writ was sustained on appeal, the petitioner was thereafter returned to the custody of the warden in New York and for that reason we regarded and described the writ as discharged. In any event, since the petitioner has fully served the sentence which kept him in the custody of the warden, his release from imprisonment has rendered moot the particular issue involved in this case. It is well settled that when the detention is ended

the object of the writ is met and the right or wrong of its issuance is no longer at issue. See *Stallings* v. *Splain*, 253 U.S. 339, 343.

The petitioner points to the fact that, after his production in California pursuant to the writ, he was, on April 9, 1959, ordered by the court to appear before the grand jury; that he is still subject to that order; and could eventually be held in contempt if he failed to obey the order. He argues that, for that reason, the proceeding is not moot. Any issues with respect to the petitioner's appearance before the grand jury may, however, be raised in connection with that proceeding, when and if a final judgment against him is entered. So far as the writ of habeas corpus ad testificandum itself is concerned, there is no longer any subject matter on which the court can act since the petitioner is not in custody.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

SUPREME COURT, U.S.
FILED
NOV 1 1959

No. 202

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 202

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On October 26, 1959, the Court issued the following order:

> In light of the Government's contention that the issues in this case are now moot, the Solicitor General is requested to advise the Court as promptly as possible whether the Government deems (1) the District Court's order of May 29, 1959, which directed petitioner to appear before the grand jury on July 30, 1959, (2) the order to show cause issued by the District Court on May 19, 1959, or (3) the writ of habeas corpus ad testificandum, to be presently outstanding, in that any of the above can possibly hereafter be made the foundation for contempt proceedings against petitioner.

1. In response thereto, the government states that in its view the writ of habeas corpus ad testificandum is not presently and cannot be outstanding since petitioner is not in the custody of the warden to whom the writ is directed. The writ ad testificandum was merely a direction to the warden to produce petitioner, who could not be required to come before the grand jury, of his own volition because he was in jail. Since petitioner is no longer in jail, the writ directed to the warden can serve no function. A writ of habeas corpus, no matter what form it takes, is based on custody. Whatever may be the validity or invalidity of the issues underlying a habeas corpus proceeding, the habeas corpus proceeding itself becomes moot, once custody has terminated. The issues, if any remain, must be litigated in some other proceeding. See *Stallings* v. *Splain*, 253 U.S. 339, 343–344; *Johnson* v. *Hoy*, 227 U.S. 245, 247–248.

2. After petitioner was produced in California, he refused in several appearances to testify before the grand jury. After the Court of Appeals for the Ninth Circuit had entered the order dismissing the appeal, petitioner was ordered by the district court to appear as a witness before the grand jury on May 12. Upon his refusal to testify at such proceeding, an order to show cause why he should not be punished for contempt was issued on May 19, 1959. At the hearing on that motion, the district court, upon being assured by petitioner that he would testify, entered its order of May 29, 1959, directing him to appear before the grand jury on July 30, 1959.

In the meantime, however, petitioner and others had been indicted in the United States District Court for the Southern District of New York for conspiracy to obstruct justice. Because of that indictment he was excused from appearing on July 30 until directed to do so by the government. Petitioner is now on trial under the New York indictment.

Petitioner cannot be held in contempt unless he is directed by the government to appear before the grand jury of the Southern District of California pursuant to the order of May 29, and then refuses to testify at that proceeding. While, technically, the order to show cause and the order of May 29 are still outstanding, in view of petitioner's pending indictment and trial in New York the government will take no action under those orders. The government does not expect to call petitioner at all before this grand jury, but if it should become necessary to do so it will proceed by a new subpoena.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES.

JOSEPH K. HERTOGS,
580 Washington Street,
San Francisco, California,
Attorney for Petitioner.

WILLIAM B. BEIRNE,
G. VERNON BRUMBAUGH,
408 South Spring Street,
Los Angeles 13, Calif.
Of Counsel.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

IN THE

Supreme Court of the United States

October Term, 1959.

No. 202.

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES.

In response to the Court's request that the Government advise the Court whether the Government deems

1. The District Court's order of May 29, 1959 which directed petitioner to appear before the Grand Jury on July 30, 1959;

2. The order to show cause issued by the District Court on May 19, 1959; or

3. The writ of *habeas corpus ad testificandum,*

to be presently, outstanding, in that any of the above can possibly hereafter be made the foundation for contempt proceedings against petitioner, the Government states that the writ is not presently outstanding, since petitioner is not in the custody of the warden to whom the writ was directed. However, as we have pointed out in our reply brief, the writ was never discharged by the District Court

or otherwise. The writ had ordered the petitioner returned to New York upon completion of his testimony before the grand jury in Los Angeles. That matter had not been completed, and has not yet been completed; to the contrary, at the time petitioner was taken back to New York without notice to him or to his attorney, there were then pending the order to show cause issued by the District Court on May 19, 1959, as well as the order of the same made on May 29, 1959 requiring petitioner to appear before the grand jury on July 30, 1959.

However, be that as it may, and assuming that the writ is no longer outstanding, as argued by the Government, it was certainly alive and vibrant at the time the District Court issued its order to show cause on May 19, 1959, and also at the time the District Court made its order on May 29, 1959 directing the petitioner to appear before the grand jury on July 30, 1959. Each of these orders was predicated upon and arose out of the issuance of the writ of *habeas corpus ad testificandum* which was then in full force and effect. These orders are now in the same status as when they were made—outstanding and pending. It is obvious that either of them can *possibly* hereafter be made the foundation for contempt proceedings against petitioner.

The Government's asseveration that it does not intend to require the petitioner to appear before the grand jury pursuant to the orders of the District Court, assumes that petitioner's appearance there lies in the discretion of the Government, which can order him to appear or not as it sees fit. If this be so, then, perforce, it is certainly *possible* that either of said orders can be made the foundation for contempt proceedings against petitioner. In this connection, we might add that these orders were orders

made by the District Court, and it seems to us that that Court itself might have some power over its own orders, regardless of the Government's position that it has the discretion to order the petitioner to appear.

The orders in question have never been modified, changed or vacated by the District Court, and according to the record, they are still pending and outstanding. The Government does not contend that the orders could not *possibly* hereafter be made the foundation for contempt proceedings against petitioner, but it does concede that they are "technically" outstanding. If they be outstanding, "technically" or otherwise, then the possibility of their use as the basis for contempt proceedings against petitioner is at once obvious.

Respectfully submitted,

JOSEPH K. HERTOGS,

Attorney for Petitioner.

WILLIAM B. BEIRNE,

G. VERNON BRUMBAUGH,

Of Counsel.